CHEOK YUK KENG & ORS

v.

LIEW KAM FONG

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: 24-1354-1986]
16 APRIL 1999

CIVIL PROCEDURE: *Want of prosecution - Delay - Whether case based on oral evidence - Whether delay would impair memory of witnesses - Whether a fair trial possible - Whether defendant prejudiced*

This was an application by the plaintiffs for a reinstatement of the civil suit against the defendant. The said suit was struck off by this court earlier as neither the plaintiffs nor their solicitor attended court after a show cause letter was issued to them.

The plaintiffs blamed their previous solicitor for the striking off of the civil suit.

Held:

[1] The principles governing applications to strike out actions for want of prosecution also apply to applications for reinstatement of suits struck off by the courts. The court has the discretionary power to strike out an action for want of prosecution if the default of the plaintiff has been intentional and contumelious or the plaintiff has been guilty of inordinate and inexcusable delay in prosecuting his claim, and that delay gives rise to substantial risks that it is not possible to have a fair trial or for that matter it is likely to cause or have caused serious prejudice to the defendant.

[2] The defendant must establish that as a result of the plaintiff's delay there was a risk that either the fair trial of the action would be put in jeopardy or that the defendant would suffer serious prejudice.

[3] If the case is based on documentary evidence, the delay may not give rise to the risk that a fair trial may be impeded. But if the case is based largely on oral evidence of their parties and their witnesses, the long inordinate and inexcusable delay will impair the memory of the witnesses especially when the witnesses are old. A fair trial will not be achieved if key witnesses have died or cannot be traced.

[4] The undue influence pleaded by the defendant was dependant on oral evidence of certain witnesses. Doctors and individual personalities have to take the stand and give evidence for the defendant. The long and inexcusable delay by the plaintiffs would affect the fair trial of the issues involved.

[5] The right to be heard claimed by the plaintiffs must be shackled by the rules of procedure laid out in the Rules of the High Court 1980. Their previous solicitor should have referred their case to another solicitor who could handle the case expeditiously and within the framework of the said Rules. The defendant should not be put in limbo and feel uncertain as to the fate of his case in court.

[Application dismissed.]

Case(s) referred to:
Allen v. Sir Alfred McAlpine & Sons Ltd [1968] 2 QB 229 ***(refd)***
Antcliffe v. Gloucester Health Authority [1992] 1 WLR 1044 ***(refd)***
Birkett v. James [1978] AC 297 ***(refd)***
Biss v. Lambeth, Southwark and Lewisham Health Authority [1978] 2 All ER 125 ***(refd)***
Datuk Samy Vellu v. Karpal Singh [1989] 3 MLJ 493 ***(refd)***
Department of Transport v. Chris Smaller (Transport) Ltd [1989] AC 1197 ***(refd)***
Esa Sa'yon v. Woon Kim Poh & Anor [1995] 3 AMR 2524 ***(refd)***
Haynes v. Atkins [1983] CLY 2927 ***(refd)***
KS Chua & Co v. Chui Miang Chew & Ors [1995] 3 AMR 2605 ***(refd)***
Leong Seng Kiat v. Law Peng Guan [1992] 2 CLJ 825 ***(refd)***
Packirisamy v. Janagi [1970] 2 MLJ 202 ***(refd)***
Trill v. Sacher [1993] 1 All ER 961 ***(refd)***
Vasudevan v. T Damodaran & Anor [1981] MLJ 150 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 34 r. 8(2)

For the plaintiffs - Mathews George; M/s Danaraj Mathews Jimmy & Sara
For the defendant - V Marimuthu; M/s VM Muthu & Co

Reported by Usha Thiagarajah

JUDGMENT

Abdul Malik Ishak J:

Introduction

By way of a summons in chambers in encl. 61, the plaintiffs sought for the following prayers:

(a) that the Order made by this Honourable Court on 21st day of April, 1995 may be set aside and this action may be reinstated for hearing;

(b) that the Caveat entered at Pejabat Tanah & Galian, Johor Bahru, Johor *vide* Pres No: 9372 Jld: 601 Folio: 26 on 11/12/1991 which will be expiring on 10/12/1997 shall be extended until the outcome of this suit;

(c) such further or other relief as this Honourable Court may deem fit and just;

(d) the costs of this application be costs in the cause.

Before me the plaintiffs confined their submissions on only one point. This was in regard to the reinstatenent of the present civil suit that was struck out by this court on 21 April 1995 due to the failure of the plaintiffs or their solicitors to appear in court pursuant to a notice to show cause as reflected in encl. 53 as issued by this court. Enclosure 61 was supported by an affidavit of Mr. K. Gnasegaran s/o R. Krishnan in encl. 60. The affidavit in reply would be encl. 70 and this was deposed by the defendant. Then there was an additional affidavit of Mr. Han See Juan - the fifth plaintiff, as seen in encl. 72. The defendant responded and filed an affidavit in reply in encl. 74. Finally, Mr. H.L. Tennakoon filed an affidavit in encl. 74A in support of the plaintiffs.

It must be emphasised that in deliberating encl. 61, reference was also made to the pleadings and the other relevant affidavits. This will be demonstrated in the course of this judgment.

The defendant took a firm stand and strenously argued through Mr. V. Marimuthu that the plaintiffs' application in encl. 61 should be dismissed with costs. Mr. V. Marimuthu too argued that the application in encl. 61 was contumelious, inexcusable and suffered from an inordinate delay. The defendant made no bones about it and argued that the absence of the plaintiffs' counsel on 21 April 1995 must be construed against them as it showed the disregard and disrespect to the court.

Factual Background And The Law

The facts were not disputed. It was common ground that a show cause was issued to the plaintiffs by this court on 21 April 1995 and because of the absence of the plaintiffs or their solicitors the civil suit was struck off by this court. The plaintiffs placed the blame squarely on their solicitors for the striking off of the civil suit.

The plaintiffs contended through Mr. Mathews George that they have engaged Mr. H.L. Tennakoon for his experience and expertise and because of these reasons they had left the entire conduct of this case to Mr. H.L. Tennakoon for him to ventilate their claims expeditiously in accordance with the relevant rules and procedures. But having entrusted this task to Mr. H.L. Tennakoon, the plaintiffs took an unprecedented course of action and wanted to break free from being shackled and are now blaming their solicitors for their predicament. Not only that the plaintiffs too held onto the notion that they could not be held accountable for the manner in which the action was struck off. Indeed if this was the contention of the plaintiffs then there was absolutely no reason for this court to exercise its discretion to reinstate the civil suit because the plaintiffs' solicitors being a senior member of the bar could hardly be said to be ignorant of the rules and procedures as exemplified in the Rules of the High Court, 1980 ["RHC"]. The plaintiffs could have appointed another legal firm to conduct the case for them if the predicament of Mr. H.L. Tennakoon was in issue. The plaintiffs took an easy way out and blamed their solicitors for their predicament and surely this court cannot condone this kind of attitude. The plaintiffs must be held accountable for the manner in which the action was struck off as the acts of the solicitors can be imputed to be and to mean the acts of the clients.

Order 34 r. 8(2) of the RHC states as follows:

> If no notice of trial is given or if the defendant makes no application to dismiss the action under sub-rule (1), the Court or Judge may after giving such notice as may be necessary to dismiss the cause or matter or may make such order and on such terms as to costs or otherwise as to the Court or Judge may seem just.

and it gives the High Court the power to call up pedantic action and interrogate the plaintiffs for their default and delay in prosecuting their claims. The High Court is certainly empowered to dismiss the action if no reasonable explanation is given for the delay or make any other orders as it deems fit. The plaintiffs contended that they were not aware of the notice to show cause as they had left the conduct of the case to Mr. H.L. Tennakoon. In encl. 74A, Mr. H.L. Tennakoon deposed that he was the previous solicitors for the plaintiffs and when the notice to show cause was sent to his law firm, his law firm had ceased to operate and he was no longer in practice. Obviously in the context of the present case no reasonable explanation was proffered by the plaintiffs for the simple reason that they were not aware of the notice to show cause.

The principles governing applications to strike out actions for want of prosecutions must surely apply to applications for reinstatements of suits that had been struck off by the courts. Sanctions must be imposed to those responsible for the dilatory and inefficient conduct of litigation. The courts

must not be too lenient in dealing effectively with excessive delays as they would in turn breed excessive further delays which would bring with it ancillary costs. There must be a system of rules which are more stricter, more effective and above all simple to apply. The House of Lords in *Birkett v. James* [1978] AC 297; [1977] 2 All ER 801; [1977] 3 WLR 38, approved the decision of the Court of Appeal in *Allen v. Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229; [1968] 1 All ER 543; [1968] 2 WLR 366 to the effect that a judge has a discretionary power to strike out an action for want of prosecution. Thus, (1) if the default of the plaintiff has been intentional and contumelious or (2) that the plaintiff has been guilty of inordinate and inexcusable delay in prosecuting his claim, and (3) that delay gives rise to substantial risks that it is not possible to have a fair trial or for that matter it is likely to cause or have caused serious prejudice to the defendant, then the court has the discretionary power to strike out an action for want of prosecution. These are general principles of law that have been repeated time and again and they can now be considered as trite.

In the context of the present case, the summons for directions was granted on 28 January 1992 (encl. 52) and the sealed copy of it was only served after a lapse of two years one month 11 days and this was on 9 March 1994. Surprisingly, the plaintiffs did nothing after 28 January 1992 and the inaction remained until the notice to show cause in encl. 53 dated 10 April 1995 was issued. When that notice to show cause was heard on 21 April 1995 and the civil suit was struck out by this court the plaintiffs waited for some time to file encl. 61 for reinstatement. To be precise and exact, encl. 61 was dated 26 July 1997 and it was filed on the same date. The affidavit in support in encl. 60 affirmed by Mr. K. Gnasegaran on 26 July 1997 was also filed on the same date. Calculation wise the plaintiffs took two years three months five days from 21 April 1995 to file encl. 61 to reinstate the civil suit that was struck off by this court. But when computation of time starts from the date when the summons for directions was granted on 28 January 1992 till the date when encl. 61 was filed on 26 July 1997, the delay was indeed inordinate and inexcusable – it came up to five years five months 28 days. In *K.S. Chua & Co v. Chui Miang Chew & 5 Ors* [1995] 3 AMR 2605, 2617, I said:

> From the authorities, what constitutes inordinate delay is a question of fact and as a rule, until a credible excuse is made out, the irresistible inference is that that delay is patently inexcusable. As Lord Denning MR in *Allen v. Sir Alfred McAlpine & Sons Ltd* [1968] QB 229 succinctly said:
>
> > When the delay is prolonged and inexcusable, and is such as to do grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away.

In *Esa bin Sa'yon v. Woon Kim Poh & Anor* [1995] 3 AMR 2524, inordinate and inexcusable delay orchestrated the failure of the plaintiff to have the case reinstated. At p. 2534, the court observed:

> Two years had passed (to be exact 2 years one month and 17 days) after the court was told that the first defendant had died before the notice to show cause was heard by my immediate predecessor (April 16, 1992 to June 3, 1994). There was a further delay of more than 9 years (to be exact 9 years 10 months 15 days) from the time the writ and the statement of claim were filed (September 6, 1984) to the time my immediate predecessor struck out the present case (July 21, 1994). These delays were not even explained by Vasumathi in her affidavit. I cannot venture on mere conjectures for the plaintiff's sake.

The affidavit in reply deposed by the defendant in encl. 70 showed that only the first and the fifth plaintiffs were interested in reinstating the civil suit. The second, third, and fourth plaintiffs were not interested at all in reinstating the civil suit and they did not affirm affidavits in support of encl. 61. Even the first plaintiff did not affirm an affidavit in support of encl. 61. In encl. 70 the defendant raised the issue of prejudice and asserted that the application in encl. 61 was contumelious and there was delay that was not explained which delay was said to be inexcusable and inordinate. The defendant deposed in encl. 70 the following set of facts:

(1) that the case was filed in 1986 and till 1995 there were no attempts by the first and fifth plaintiffs to bring the case to trial;

(2) in 1988, the case was transferred from the Sessions Court to the High Court;

(3) from 1988 to 1994, no attempts were made by the first and fifth plaintiffs to bring the case to trial;

(4) in 1994, by way of a letter dated 9 March 1994 M/s. H.L. Tennakoon sent the sealed copy of the summons for directions which was worded, *inter alia:*

> Trial within Two (2) Days With Five (5) Witnesses And To Be Set down Within Thirty (30) Days.

(5) the summons for directions bore the date 28 January 1992 but it was only served on the defendant in March 1994;

(6) thereafter neither the solicitors for the plaintiffs which include the first and the fifth plaintiffs nor the plaintiffs themselves took steps to proceed to trial;

(7) it was the duty of the plaintiffs including the first and the fifth plaintiffs to know the development of the case;

(8) that Mr. K. Gnasegaran was instructed by Mr. H.L. Tennakoon in December 1995 to pursue further with the case notwithstanding the fact that the notice to show cause was dated 10 April 1995;

(9) it took Mr. K. Gnasegaran approximately 1½ years from December 1995 to know that the civil suit had been struck off by this court on 21 April 1995;

(10) the defendant categorically stated that he was present in court on 21 April 1995 and he denied entirely the averment of Mr. K. Gnasegaran in para. 4 of encl. 60;

(11) it was the duty and responsibility of the legal firm of M/s. H.L. Tennakoon to peruse through all correspondences received by the legal firm and inform their clients respectively of the development of the case;

(12) the defendant, a pensioner, is not in the pink of health and he said that he could not withstand the trial as the matter has long been overdue.

It was for these reasons that the defendant sought for the dismissal of encl. 61 with costs.

The fifth plaintiff affirmed an affidavit captioned as an additional affidavit in encl. 72 for himself as well as for the first plaintiff and there he stressed that the matter was in the hands of Mr. H.L. Tennakoon who knew about the procedures in the RHC and he averred that the defendant had also contributed to the delay by:

(1) amending the Statement of Defence;

(2) the withdrawal of the defendant's former solicitors from acting for the defendant; and

(3) the various meetings between the parties to settle the dispute.

The fifth plaintiff averred that he should not be penalised for the closure of the law firm of Mr. H.L. Tennakoon and whatever prejudice suffered by the defendant could easily be compensated by costs.

By way of an affidavit in reply the defendant responded as seen in enclosure 74 and there he denied all the averments in encl. 72 as the contents therein were said to be without merit. The defendant deposed that the progress of the case was entirely a private affair between the plaintiffs and their solicitors and it had nothing to do with the court. The defendant deposed that the plaintiffs

were not remediless. As against Mr. H.L. Tennakoon, the defendant deposed that the plaintiffs could still seek an explanation from that solicitor as to why the case was struck out by this court on 21 April 1998. The defendant admitted that the Statement of Defence was amended but the amendment was made on 13 August 1987. The defendant too agreed that he had a change of solicitors and the order for the change of solicitors was dated 24 March 1992. The change in the defendant's solicitors cannot give the right to the plaintiffs to delay prosecuting his case in court. It was the plaintiffs' solicitors' duty to inform and advise the plaintiffs to engage a new counsel and the plaintiffs too should have taken the necessary steps to proceed with the case. The defendant took exception to the averment of the fifth plaintiff as to the defendant's state of health. The defendant deposed that he had a heart problem and other related ailments and for this purpose he exhibited a letter from "Klinik Federal" marked as exh. "LKF1" to back up his assertions.

Mr. H.L. Tennakoon affirmed an affidavit in encl. 74A and he confirmed that his law firm ceased to operate at the material time and that he too ceased to practise law. This was a short averment by a lawyer who was supposed to have the affairs of his client close to his heart. Mr. H.L. Tennakoon did not draw his attention to the notice to show cause that was dated April 10, 1995 as reflected in encl. 53 nor did he depose to the striking out of the civil suit on 21 April 1995 by this court. The fact that Mr. H.L. Tennakoon instructed Mr. K. Gnasegaran in December 1995 to proceed further in the matter suggested that Mr. H.L. Tennakoon was in receipt of that notice to show cause. That would be the only reasonable conclusion for this court to construe, in the circumstances. That being the case, why didn't Mr. H.L. Tennakoon advise his clients - the plaintiffs about that notice to show cause and act accordingly thereto. These are questions that are left answered as they were not alluded to at all in encl. 74A.

So much for the affidavits of the parties in regard to encl. 61.

Now, the prejudice adverted to by both parties would be a subject of some interest. Would the defendant be prejudiced by the inordinate and inexcusable delay alluded to in the early part of this judgment?

Lord Griffiths in *Department of Transport v. Chris Smaller (Transport) Ltd* [1989] AC 1197; [1989] 1 All ER 897; [1989] 2 WLR 578 emphasised in no uncertain terms that prejudice to the defendant is quite wide and is not limited to proof of prejudice in the conduct of the litigation only. Rather the defendant in wanting to strike out the plaintiff's case must establish that as a result of the plaintiff's delay there was a risk of the occurrence of the following:

(1) the fair trial of the action would be put in jeopardy; or

(2) that the defendant would suffer serious prejudice.

On the issue of fair trial, I have this to say. If the case hinged on documentary evidence the delay may not give rise to the risk that the fair trial may be impeded. But if the case is based largely on oral evidence of the parties and their witnesses, the long inordinate and inexcusable delay would have impaired the memory of the witnesses especially when the witnesses are old. A fair trial too would not be achieved if the key witnesses have died or could not be traced. As Neill LJ said in *Trill v. Sacher* [1993] 1 All ER 961 at p. 980:

> Prejudice to the defendant may take different forms. In many cases the lapse of time will impair the memory of witnesses. In other cases, witnesses may die or move away and become untraceable.

The first and the fifth plaintiffs argued that the present case centred entirely on documentary evidence. This calls for an examination of the documents in the court file. Particular reference should be made to the pleadings. Undue influence was pleaded and the particulars thereof were listed therein. It was the defendant's contention that the agreement to sell the shares dated 30 September 1985 was tainted as it was entered against the defendant's free consent. The defendant's must surely lead evidence at the trial to show that the agreement was induced by undue influence as the plaintiffs were said to be in a position to dominate the defendant's will and, consequently, the plaintiffs have used that position to obtain an unfair advantage over the defendant. The defendant felt that the plaintiffs dominated his will at the time of entering into the agreement as the defendant's mental capacity was said to be temporarily affected by reason of illness, mental and bodily distress. The defendant too felt that the agreement on the face of it was unconscionable. The defendant too held the view that the agreement did not truly reflect the intentions of the parties. If the intentions of the parties were properly reflected, the agreement would consist of reciprocal promises. It was the defendant's stand that if the plaintiffs have failed to perform their part of their contractual promises, the agreement was said to be voidable at the option of the defendant and the defendant have chosen to avoid the agreement. The defendant laid stress that he had a bad medical record with a history of migraine and heart problem and for these reasons he opted for early retirement from the government service in 1984. Despite the defendant's bad medical record he still ventured into business with some friends and this was how Juta Motor Enterprise Sdn Bhd ["JMESB"] came into being. According to the defendant the business in JMESB became very messy. A lot of shareholders came and went within a very short period of time. The defendant had a few friends but a lot of enemies and he had to remove the bad hats. That was only the tip of

the iceberg. According to the defendant by August 1985 he became so disoriented with JMESB's business that he went into a spell of nervous breakdown. Friends came to the aid of the defendant who took him to the temples to pray. In February 1986 or thereabouts the defendant recovered his composure. According to the defendant he was in a spell - like state for over a stretch of seven months but things did not turn out for the better. The defendant became suicidal and was admitted to the mental ward of the Johor Bahru general hospital from December 1986 till mid-June 1987. According to the defendant prior to the execution of the agreement he was in a nervous state since he had not recovered from the first dispute with the original shareholders of JMESB and had to enter into a second dispute with the second lot of the shareholders of JMESB. The plaintiffs herein formed the third group of shareholders. There was a dispute between the parties regarding the cause of the losses suffered by JMESB. The plaintiffs were putting the blame on the defendant and the defendant was trying to explain the situation. Eventually things got worse and the defendant wanted to resign from JMESB. The defendant too wanted to sell his 200,000 shares to the plaintiffs but the plaintiffs refused to accept the proposal since the plaintiffs felt that there was nothing much left in JMESB. Surprisingly, the plaintiffs proposed that the defendant purchased the plaintiffs' shares, more of a buy-over proposal. The defendant retorted that there was not much value in the plaintiffs' shares in JMESB. The plaintiffs became adamant and insisted that the defendant bought over the plaintiffs'shares in JMESB in order to settle the disputes amicably between them. Numerous negotiations between the parties turned out to be futile. All negotiations simply broke down and so the parties went to see Mr. Koay Hun Teo, an accountant friend of the defendant, to resolve the disputes. This too failed, and the parties then went to see Mr. Ho Thian Cheh, a prominent lawyer in Johor Bahru. At that time the defendant was still suffering from mental distress. All the defendant wanted was peace of mind. To settle the dispute was foremost in the defendant's mind. The defendant thought that the dispute would end if the defendant were to buy the plaintiffs' shares. The defendant thought that money would put to rest the quarrels and the disputes. This was what the defendant thought to be the best solution at the material time. The negotiations between the parties went on incessantly. The plaintiffs were business minded. Seeing that there was an opportunity to get some money despite the down turn in the business of JMESB, the plaintiffs insisted that an agreement be drafted and executed in order to tie the defendant down. It was the defendant's stand that if he was in a better mental state of mind he would have refused to purchase the plaintiffs' shares. The defendant too was of the view that if he was in his right, sound and proper frame of mind, he

would not have executed the agreement for the following reasons:

(1) the defendant would not have agreed to pay the plaintiffs RM130,000 since the parties were shareholders of JMESB and, consequently, any loss suffered by JMESB should be borne by all;

(2) the defendant did not have any ready cash;

(3) the defendant would not have agreed to purchase the plaintiffs 200,000 shares for RM130,000 because the defendant had already lost RM200,000 out of his 200,000 shares;

(4) the defendant would be losing more money by purchasing the plaintiffs' shares when the business of JMESB was at a stand still;

(5) the defendant was not able to think rationally at that time as he was pressurised to compensate the plaintiffs for their losses and they were blaming the defendant for the bad turn in business;

(6) pressure was brought to bear on the defendant and with the accusations and ill-feelings from the plaintiffs, the defendant was forced into a corner and his sense of balance went off tangent and all these made the defendant believed that entering into the agreement would appease the plaintiffs forthwith.

For these varied reasons, the defendant felt that the consent that he gave to the plaintiffs to purchase those shares was induced by undue influence of the plaintiffs and the agreement ought to be treated as null and void and of no effect. Thus, it can be seen that undue influence as pleaded by the defendant would be dependent on oral evidence of certain witnesses. Doctors, individual personalities like Mr. Koay Hun Teo and Mr. Ho Thian Cheh would definitely have to take the stand and give evidence for the defendant. Fellow shareholders, past and present, of JMESB must also give evidence. The long and inexcusable delay as illustrated in the early part of this judgment would affect the fair trial of the issues in the civil suit. This was my judgment and I so hold accordingly.

This brings me to the issue of prejudice. So long as the inordinate and inexcusable delay would cause serious prejudice to the defendant that would be sufficient to set aside the civil suit and reinstatement too would be next to impossible. The court must determine whether the defendant has established serious prejudice. At this juncture, it is germane to quote a passage from *Lord Griffiths in Department of Transport v. Chris Smaller (Transport) Ltd* [1989] AC 1197 at p. 1209; [1989] 1 ALL ER 897 at p. 904; [1989] 2 WLR 578

at p. 587:

> ... prejudice may be of varying kinds and is not confined to prejudice affecting the actual conduct of the trial. It would be foolish to attempt to define or categorize the type of prejudice justifying striking out an action ... .

Instances where the courts have held that the defendants have established sufficient prejudice to warrant the striking out of actions can be seen in the following situations:

(1) anxiety suffered and experienced by nurses whose professional competence was put in question was held by the English Court of Appeal to be sufficient prejudice to justify the striking out of the action (*Biss v. Lambeth, Southwark and Lewisham Health Authority* [1978] 2 ALL ER 125; [1978] 1 WLR 382).

(2) the delay hanging over the head of a professional man was said to be a ground of prejudice (*Haynes v. Atkins* [1983] CLY 2927).

(3) the defendant who was a politician and a well-known lawyer was said to be prejudiced by the plaintiff's delay of eight years in prosecuting the libel action against the defendant (*Datuk Samy Vellu v. Karpal Singh* [1989] 3 MLJ 493).

(4) the financial loss in the running of the business sustained by the defendant was said to be such prejudice that would entitle the court to strike out the plaintiff's cause of action (*Department of Transport v. Chris Smaller (Transport) Ltd [supra]).*

(5) great financial loss was sustained by a health authority by reason of the plaintiff's delay and this was categorised as sufficient prejudice (*Antcliffe v. Gloucester Health Authority* [1992] 1 WLR 1044).

All the defendant need do here is simply to show that there is a likelihood of prejudice. Once the delay is likely to cause serious prejudice then there is also a risk that a fair trial may not be achieved. On both counts, the defendant had succeeded extremely well. This was part and parcel of my judgment.

Mr. Mathews George submitted that the first and the fifth plaintiffs were eager to put forward their case in the trial proper. It was his submission that they should not be punished for circumstances that had happened and which went beyond their control. To him the prejudice incurred by the defendant could easily be compensated by costs. In the context of setting aside an order made in default of appearance, Sharma J had this to say in *Packirisamy v. Janagi*

[1970] 2 MLJ 202, 203:

> In exercising their discretion it is the duty of the courts to exercise that discretion judicially, that is in accordance with commonsense and in doing so should bear in mind all that may promote justice and not defeat it. If discretion is exercised otherwise, it may only tend to strike at the root of justice or result in injustice being done. I am furthermore of the view that every opportunity should be given to the litigants to put forward their cases and that they have a right to be heard within the limits prescribed by law if they do not violate any of the principles of procedure that the law has laid down. They have a right to be heard and it is the function of the courts to see that no unnecessary shackles are put on them by such rules of procedure which empower the courts to exercise the discretion one way or the other especially if one of the parties concerned can be adequately compensated by costs.

But in the context of the present case, the inordinate and inexcusable delay cannot assist the first and the fifth plaintiffs at all. For that matter, that kind of delay can never assist all the plaintiffs. In *Vasudevan v. T. Damodaran & Anor* [1981] MLJ 150, the delay of three years and three months was held to be inordinate. In *Leong Seng Kiat v. Law Peng Guan* [1992] 2 CLJ 825, Mohamed Dzaiddin J. (now FCJ) held that two years and eight months was an inordinate delay on the part of the plaintiff to prosecute the action and that delay was fatal. The right to be heard as claimed by the plaintiffs must be shackled by the rules of procedure as laid out in the RHC. Justice is double-edged. To do justice to the plaintiffs, Mr. H.L. Tennakoon should have referred the plaintiffs' case to another solicitor who could handle the case expeditiously and within the framework of the RHC. The defendant should not be put in limbo and feel uncertain as to the fate of his case in court. There must be promptitude on the part of the plaintiffs in prosecuting their claim. Lord Diplock LJ in *Allen v. Sir Alfred McAlpine & Sons* [1968] 1 All ER 543 at p. 555 aptly said:

> ... it would be unrealistic to expect the defendant in an ordinary action for damages, particularly in accident cases, to take steps to hasten on for trial an action in which the plaintiff's prospect of success appear at the outset to be good. ... It is thus inherent in an adversary system which relies exclusively on the parties to an action to take whatever procedural steps appear to them to be expedient to advance their own case, that the defendant, instead of spurring the plaintiff to proceed to trial, can with propriety wait until he can successfully apply to the court to dismiss the plaintiff's action for want of prosecution on the ground that so long a time has elapsed since the event alleged to constitute the cause of action that there is a substantial risk that a fair trial of the issue will not be possible.

and applying it vigorously to the facts of the present case, the defendant here need not spur the plaintiffs to proceed to trial. The defendant can simply wait

with decorum until such time when he can take the necessary action to strike out the plaintiffs' claim for want of prosecution on two grounds:

(1) fair trial; and

(2) prejudice.

For the reasons adumbrated above, I dismissed encl. 61 with costs.